Supreme Court, U.S.
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No. 85-2170

In The

Supreme Court of the United States

October Term, 1985

—o—

JOSEPH L. DROCIAK,

Appellant,

v.

SUPREME COURT OF NEW HAMPSHIRE,

Appellee.

—o—

On Appeal from the Supreme Court of New Hampshire

—o—

MOTION TO DISMISS OR AFFIRM

—o—

SUPREME COURT OF NEW HAMPSHIRE

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No. 85-2170

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JOSEPH L. DROCIAK,

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SUPREME COURT OF NEW HAMPSHIRE,

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On Appeal from the Supreme Court of New Hampshire

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MOTION TO DISMISS OR AFFIRM

—o—

The State of New Hampshire, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves to dismiss or affirm the final judgment of the Supreme Court of the State of New Hampshire in this case on the ground that the question is so unsubstantial as not to warrant further argument.

—o—

RULE INVOLVED

New Hampshire Supreme Court Rule 42(8) provides: "Except upon approval of the Supreme Court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two (2) years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed."

STATEMENT

This is an appeal pursuant to 28 U.S.C. § 1257 from the final order of the New Hampshire Supreme Court, dated March 28, 1986, denying appellant's motion for admission to the New Hampshire bar.

In 1961, appellant took and passed the New Hampshire bar examination. He was not admitted to the bar, however, because he did not meet New Hampshire's residency requirement then in effect. On October 12, 1979, appellant filed a Motion to Take Oaths, which he amended on February 22, 1980 by supplementary memorandum. On May 22, 1980, the New Hampshire Supreme Court denied the motion, stating that it "does not approve requests to take the oath of admission where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." Appellant's *Jurisdictional Statement*, Appendix 4. After failing to gain reconsideration, appellant appealed to this Court. *Drociak v. Supreme Court of New Hampshire*, No. 80-806 (U.S.

Supreme Court). This Court dismissed the appeal, and treating the appeal as a petition for writ of certiorari, denied certiorari.

In 1980, the New Hampshire Supreme Court amended its rules to provide that "[e]xcept upon approval of the supreme court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed." N.H. Supreme Court Rule 42(8).

On March 4, 1985, this Court held unconstitutional New Hampshire's residency requirement for admission to the bar. *Supreme Court of New Hampshire v. Piper,* 470 U.S. ——, 84 L.Ed.2d 205 (1985). In response to that decision, the New Hampshire Supreme Court adopted a special policy providing an exception to the requirements of Rule 42(8) for bar applicants who had previously been denied admission solely because of the residency requirement. Such an applicant may be admitted without the need to again pass the bar examination if the applicant received a passing score on a previous New Hampshire bar examination comparable in form and content to the present examinations. Appellant's *Jurisdictional Statement,* Appendix 17. New Hampshire began including the multistate examination as part of its bar examination in July, 1973. Thus, applicants who successfully passed New Hampshire's bar examination after July, 1973, need not take the bar examination again in order to be admitted to New Hampshire's bar. Applicants who passed New Hampshire's bar examination prior to July, 1973, are not foreclosed from being admitted to the bar; they are simply

required either to demonstrate the appropriate level of competence by passing the current bar examination, or demonstrate good cause for a waiver under Rule 42(8).

In 1985, appellant filed a motion for admission to the bar of New Hampshire, accompanied by a memorandum in support thereof. *Request for Admission to the Bar of Joseph L. Drociak,* SMC-85-006 (N.H.). In his motion, appellant requests that the New Hampshire Supreme Court make an exception to Rule 42(8) and the special policy on the grounds that he grew up in New Hampshire and has family there.[1] Appellant also challenges the constitutionality of the special policy on the grounds that the July, 1973 cut-off violates his rights to equal protection and due process.[2] In his prayer for relief, appellant requested specifically either that an exception be made to the special policy for him, or that the New Hampshire Supreme Court amend the policy so as to allow petitioner to be admitted to the bar. Appellant further requested that New Hampshire's highest court either hold a hearing on his motion "or otherwise explain the rational relationship between the Policy and State objectives . . . ." *Motion to be Admitted to New Hampshire Bar* (reproduced as Appendix 1).

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[1] Appellant took up residence in California in 1961, and has not been a resident of New Hampshire since. Appellant's *Jurisdictional Statement* at 7.

[2] Appellant argued in his motion to the New Hampshire Supreme Court that issuance of the special policy without prior notice to him violated his right to due process. Appellant does not raise that issue on appeal to this Court. Instead, appellant contends in his appeal to this Court that the failure of the New Hampshire Supreme Court to hold a hearing upon his motion for admission violated his right to due process.

By order dated March 28, 1986, the New Hampshire Supreme Court denied the motion without a hearing. The court responded to the request that it explain the reason for the July, 1973 cut-off date; it stated that the multi-state examination was first required then, and the court concluded that competency to practice law was better measured by the examinations given after July, 1973. Appellant's *Jurisdictional Statement*, Appendix 18.

Appellant filed this appeal on June 24, 1986. Appellant's first Jurisdictional Statement was received by appellees on June 26, 1986. Appellant's revised Jurisdictional Statement was received by appellees on July 7, 1986. Accordingly, this motion to dismiss or affirm is timely if mailed within thirty (30) days of July 7, 1986. Supreme Court Rules 16.1 & 28.2.

———o———

ARGUMENT

I. Appellant Properly Invokes this Court's Appellate Jurisdiction Under 28 U.S.C. § 1257.

Appellant correctly asserts in his jurisdictional statement that this proceeding is an appeal brought under 28 U.S.C. § 1257. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-86 (1983), this Court held that review by appeal properly lies from a final state court order denying a particular application for admission to the bar, even if the challenge alleges that the State Court's action was unconstitutional. When the state court acts in a judicial capacity, review of its decision may be had only in the United States Supreme Court. *See Id.*

There can be no doubt that the New Hampshire Supreme Court acted in its judicial capacity in denying appellant's motion for admission to the bar. Appellant sought and received a declaration of his rights as they stood, made against the background of existing rules. His motion set forth factual allegations concerning his ties to New Hampshire and his alleged unique situation. Legal arguments were presented both in his motion and accompanying memorandum. The New Hampshire Supreme Court assigned a docket number to petitioner's case, considered the pleadings and disposed of the case by issuance of an order. By its order denying the motion, the New Hampshire Supreme Court adjudicated appellant's "claim of a present right to admission to the bar." *In re Summers,* 325 U.S. 561, 568 (1945). "This is the essence of a judicial proceeding." *Feldman,* 460 U.S. at 481.

Appellant's arguments on appeal do not constitute general challenges to state bar admission rules, which may properly be raised in the United States District Courts. Appellant sought, but did not receive, an exception from Rule 42(8)'s requirement that the oath of admission be taken within two (2) years after passing the bar examination. Clearly, his arguments for an exception based upon his special ties to New Hampshire can only be reviewed on appeal to this Court. *Feldman,* 460 U.S. at 486-87. Similarly, his due process argument regarding the lack of a hearing below is not a general challenge to a state bar admission rule, and is reviewable only in this Court. *See Doe v. Pringle,* 550 F.2d 596 (10th Cir. 1976) (federal district court was without subject matter jurisdiction to review final state court order denying application for admission to bar, where one issue raised was due process challenge to failure to hold hearing).

Appellant's final argument concerning the constitutionality of the special policy should also be treated as a denial of his particular application for admission, even though "the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." *Doe v. Pringle*, 550 F.2d at 599 (quoted in *Feldman*, 460 U.S. at 485). The special policy at issue in effect simply sets forth a declaration by the New Hampshire Supreme Court that certain qualified bar applicants who did not take the oath of admission within two (2) years of passing the bar examination solely because of the residency requirement will meet the "good cause" exception to New Hampshire Supreme Court Rule 42(8). The special policy does not *prohibit* any applicant from being admitted to the New Hampshire bar. An applicant who does not fall within its permissive scope is not thereby automatically precluded from admission—he may apply for waiver of the two-year requirement in Rule 42(8) by seeking "approval of the Supreme Court for good cause shown . . . ." New Hampshire Supreme Court Rule 42(8). By denying his motion for admission, the New Hampshire Supreme Court simply found that appellant failed to demonstrate good cause for waiving the two-year requirement of Rule 42(8). Such a determination is reviewable only by appeal to this Court.[3]

---

[3] Appellant's request for relief below demonstrates his understanding that his motion is not a general challenge to the State rules. Appellant requested not that the lower Court strike down its special policy, but rather, that the policy be amended so as to *include* him. A successful challenge to the policy alone would be of little assistance to appellant. The result would be to require all affected applicants to apply for a waiver of Rule 42(8). There is no reason to believe that appellant's request for a waiver of Rule 42(8)'s two-year requirement would be treated any differently if the special policy for post-1973 examinees were struck down.

II. The Questions Presented on Appeal Are Unsubstantial and Do Not Warrant Further Argument.

The issues raised in this appeal are unsubstantial. The decision below is correct on the merits; the issues themselves are of little importance.

In response to this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. —. 84 L.Ed.2d 205 (1985), the New Hampshire Supreme Court issued a special policy that, in effect, declared that applicants to the New Hampshire bar who had passed a New Hampshire bar examination comparable in form and content to examinations currently given, but who had been denied admission solely because of the residency requirement, would qualify for a waiver of New Hampshire Supreme Court Rule 42(8)'s requirement that an applicant take the oath of admission within two (2) years after passing the bar examination. This policy permits successful examinees from July, 1973 and after to be admitted without re-taking the bar examination. The policy is permissive; it does not prohibit applicants who passed earlier bar examinations from being admitted. Such applicants can be admitted to New Hampshire's bar either by demonstrating good cause for a waiver of Rule 42(8)'s two-year requirement, or by passing the bar examination in its current form. In this case, the New Hampshire Supreme Court's order of March 28, 1986, simply determined that appellant failed to demonstrate good cause for a waiver of New Hampshire Supreme Court Rule 42(8)'s requirement that an applicant take the oath of admission within two (2) years after passing the bar examination. Approximately a quarter-century had passed between the time appellant took the bar examination and his proposed date for taking the oath. During that interim,

the New Hampshire Supreme Court had significantly changed the form and content of the bar examination in order to better measure the competency of applicants to the bar.[4] Given the substantial interest New Hampshire has in regulating the practice of law within its borders, *Sperry v. State of Florida*, 373 U.S. 379 (1963), the lower court's decision not to waive Rule 42(8) in this case should be upheld on the merits.

Appellant argues that the lower court's policy of granting applications for admission by applicants who passed the bar examination in or after July, 1973, violates his right to equal protection. Appellant contends that the lower court's action is subject to "strict scrutiny."[5]

It should again be noted that the New Hampshire Supreme Court has not foreclosed appellant forever from gaining admission to the bar of New Hampshire. The decision simply requires that appellant demonstrate his competence by passing the New Hampshire bar examination.

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[4] "The legitimate authority of the State to impose reasonable admissions requirements surely encompasses the prerogative to make reasonable amendments to such requirements, as these become warranted by the changing conditions of the profession." *Moity v. Louisiana State Bar Association*, 414 F.Supp. 176, 178 (E.D.La.) *on remand* 414 F.Supp. 180, *affd.* 537 F.2d 1141 (5th Cir. 1976). *See Dent v. State of West Virginia*, 129 U.S. 114, 123 (1889). The legitimate authority of a state to require high standards of qualification before it admits an applicant to the bar, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), must just as surely encompass the prerogative to improve the methods of testing those qualifications when better methods become available.

[5] Application of this standard is argued for the first time on appeal. Appellant argued in his memorandum below that the "rational connection" test applied.

> A State can require high standards of qualification, such as . . . proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). It has been held that bar examinations have a rational connection with the applicant's fitness or capacity to practice law. *See e.g., Poats v. Givan,* 651 F.2d 495, 497 (7th Cir. 1981); *Chaney v. State Bar of California,* 386 F.2d 962, 964 (9th Cir. 1967) *cert. denied,* 390 U.S. 1011 (1968). Moreover, New Hampshire has the right to change its admission requirements and its means of testing an applicant's fitness. *See* note 4 *supra.* In 1973, New Hampshire made such a change, requiring applicants for admission to the bar to pass the multistate examination.

Appellant's argument thus becomes the following: for the purpose of deciding whether good cause exists to waive Rule 42(8), the State has no rational basis upon which to distinguish appellant, who has never passed a bar examination comparable to the bar examination now required for admission and whose competency to practice law was measured by a New Hampshire bar examination given twenty-five (25) years ago, from applicants who have passed a bar examination comparable to the bar examination now given and who have done so since 1973. This argument is without merit. In determining whether to waive the two-year requirement of Rule 42(8), the New Hampshire Supreme Court was entitled to consider not only the reasons for the delay between passing the bar examination and taking the oath, but other factors such as the length of that delay, the content of the bar examination taken, etc. More-

over, the effect of the lower court's refusal to waive Rule 42(8) is not to bar forever the applicant from admission, but merely to require him to demonstrate competence by passing the bar examination in its current form. Appellant has failed to demonstrate any violation of the equal protection clause.[6]

Appellant's due process claim is no more substantial. Appellant argues that the New Hampshire Supreme Court's failure to grant a full hearing on his motion violated due process. The simple response is that appellant did not unconditionally request such a hearing. The relief sought in his motion was that the court hold a hearing or otherwise explain the rational relationship between the special policy and state objectives. In its order, the court did the latter. Thus, appellant cannot complain that he did not receive a hearing when the court gave him the alternative that he requested.

In addition, assuming appellant was entitled to procedural due process, he was not automatically entitled to a hearing. Appellant's reliance upon *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) is misplaced. Here, appellant seeks to extend the New Hampshire Supreme Court's already generous special policy from appli-

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[6] Appellant's argument that other available alternatives exist by which New Hampshire can determine the competency of appellant to practice law presupposes that strict scrutiny is the appropriate standard of review in this case. As stated in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), the appropriate test is the rational relationship test. Under that test, the State need not show that no other available alternatives exist, but merely that the means chosen by the State are reasonable. *See Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975), *cert. denied* 426 U.S. 940 (1976).

cants who passed the 1973 bar examination back to a 1961 examinee. The interests involved in determining whether to so extend the special policy or otherwise waive the two-year requirement in Rule 42(8) are entirely different from those involved when an individual is denied admission to the bar on the ground of moral unfitness, as in *Willner. See Tyler v. Vickery,* 517 F.2d 1089, 1104 (5th Cir. 1975) *cert denied* 426 U.S. 940 (1976). Here, appellant presented the salient facts and his legal arguments in his motion and memorandum. Accepting the factual allegations as true, the New Hampshire Supreme Court considered appellant's arguments and denied his motion for admission. Appellant has made no argument or showing that a hearing would have in any way reduced the risk of an erroneous decision in this case. *See Mathews v. Eldridge,* 424 U.S. 319, 343-45 (1976). Thus, appellant has failed to demonstrate a due process violation.

Finally, this Court should dismiss this appeal because the issues raised are of little significance. Essentially, appellant seeks to have the United States Supreme Court give plenary consideration to the question of whether appellant must take a bar examination. The decision below does not find appellant unqualified or unfit to practice law; it simply requires him to demonstrate competence by passing the current bar examination in order to gain admission to the bar of New Hampshire. Appellant's interest in avoiding taking the bar examination is minimal. Indeed, several cases have held that a failing examinee has no due process right to a hearing to review his grades precisely because the applicant has the right to retake the examination. *See Tyler v. Vickery,* 517 F.2d at 1103-05; *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474, 478,

(7th Cir. 1974). Clearly, these cases recognize that an applicant's interest in avoiding the actual taking of the bar examination is of little importance.

Nor is a decision in this case likely to have a widespread impact. Appellant conceded below that he is part of "what must be a small class of attorneys who took and passed the examination prior to July, 1973, but were denied admission because they were not New Hampshire residents." Appendix 1 at Paragraph 16. It seems unlikely that a decision in this case would affect anyone other than what must be a very small class of attorneys presumably residing in and practicing law in other states.

———o———

CONCLUSION

For the foregoing reasons, this appeal should be affirmed or dismissed for failure to present a substantial question.

Respectfully submitted,

SUPREME COURT OF NEW HAMPSHIRE

By its attorneys,
STEPHEN E. MERRILL
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August 5, 1986

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

In Re Joseph L. Drociak No. 85-————

MOTION TO BE ADMITTED TO
NEW HAMPSHIRE BAR

NOW COMES Petitioner, Joseph L. Drociak, by his attorney, and says that:

1. Joseph L. Drociak has been and is a member in good standing of the California bar since 1964.

BACKGROUND.

2. Having taken and passed the New Hampshire bar examination in 1961, Joseph L. Drociak has on several occasions between 1962 and 1980 petitioned this Court to take the oath of office and be admitted to the New Hampshire bar.

3. Each time this Court denied his request, first because he was not a New Hampshire resident, then because several years had elapsed between passing the examination and requesting to take the oath of admission. (See No. 79-323 (S. Ct. of New Hampshire) *In re Joseph L. Drociak*). In all other respects Mr. Drociak has fulfilled New Hampshire's admission requirements.

4. Mr. Drociak filed a Notice of Appeal of this Court's prior rulings to the United States Supreme Court on 13 November 1980. Mr. Drociak contended that the residency requirement violated the privileges and immunities clause and his rights to equal protection and due process under the Fourteenth Amendment to the U.S.

Constitution. He further argued that his rights to due process were violated by this Court's failure to notify him that the passage of several years between passing the bar examination and requesting to take the oath would bar him from admission.

5. The United States Supreme Court did not take Mr. Drociak's appeal, but shortly thereafter heard the case of *S. Ct. of New Hampshire v. Piper,* 470 US —, 84 L Ed 2d 205, 106 S Ct — (Decided March 4, 1985) which was based on similar facts. The *Piper* case held the New Hampshire bar residency requirement violative of the privileges and immunity clause of the U.S. Constitution.

6. Shortly after the *Piper* decision, Mr. Drociak sent this Court a letter, dated 14 March 1985 (See Exhibit 1), again requesting to take the oath to be admitted to the New Hampshire bar.

7. By letter dated 22 March 1985 (see Exhibit 2), the Clerk's office notified Mr. Drociak that it did not know whether he would need to retake the bar examination in order to be admitted since under Rule 42(8) more than two years had elapsed between passing the bar examination and requesting to take the oath of admission (hereinafter the "Two-Year Requirement").

8. On 28 March 1985 the Court amended its Rule 42 to delete the bar residency requirement in accordance with the *Piper* decision.

9. On 24 April, 1985, Mr. Drociak again wrote the Court (see Exhibit 3) and noted that his prior requests for admission in 1962, 1977 and 1979 all predated the 1980

Two-Year Requirement. To apply it to him at this time would be unjust.

10. By letter of 27 May 1985, Clerk Ralph H. Wood enclosed a new policy dated 13 May 1985 (hereinafter the "Policy"), adopted in light of the *Piper* decision (See Exhibit 4). The Policy allowed bar applicants who had taken the bar examinations in July 1973 and thereafter and who had previously been denied admission solely because of the residency requirement to apply for admission without having to retake the bar examination.

11. Mr. Drociak responded by letter of 20 June 1985 (see Exhibit 5) asking: 1. Whether the Policy allowed for his admission without having to retake the examination; 2. If not, the basis on which those who took the examination prior to July 1973 should be ineligible; and 3. Would the Court consider an exception to the Policy and allow Mr. Drociak to be admitted.

12. By letter of 1 August 1985 (see Exhibit 6) Mr. Wood stated that Mr. Drociak's first two questions were answered by Mr. Wood's 27 May 1985 letter and that a formal pleading would be necessary to request an exception to the policy.

13. Mr. Drociak presumes from Mr. Wood's 1 August 1985 letter that under the Policy Mr. Drociak would be required to retake the examination. Further, his having passed the pre-July 1973 examination does make him ineligible for admission since it was not comparable to the examination given in July 1973 and thereafter.

14. This Motion presents different issues from those in prior pleadings. Mr. Drociak's prior pleadings before

this Court and on appeal to the U.S. Supreme Court challenged the constitutionality of the bar residency requirement and the denial of due process in this Court's failure to notify him of the policy precluding admission where several years had elapsed between passing the examination and requesting to take the oath. The grounds for this Motion arise directly out of the issuance of the Policy, and were not and could not have been raised, heard or decided in such prior pleadings.

REQUEST FOR POLICY EXCEPTION/
CONSTITUTIONAL CHALLENGE

15. Retaking the New Hampshire bar examination would present a considerable financial and practical hardship for Mr. Drociak. Consequently, this Motion is filed in accordance with Mr. Wood's suggestion to apply for an exception to the Policy.

16. The Petitioner requests that the Court make an exception to the Policy and allow Mr. Drociak to be admitted without retaking the bar examination because Mr. Drociak's situation is unique. He is in what must be a small class of attorneys who took and passed the examination prior to July, 1973, but were denied admission because they were not New Hampshire residents. However, perhaps unlike other non-residents in this class, he grew up and has family in New Hampshire, and knows of New Hampshire laws and customs. Allowing an exception should not substantially burden the administration of justice, constitute a bad precedent, or result in a deluge of applications since there are probably so few similarly situated attorneys.

17. Alternatively to requesting that the Court make an exception to the Policy for him, Mr. Drociak challenges the Policy's constitutionality, both on its face and as applied to him. It denies him of his rights to due process and equal protection of the law under the New Hampshire Constitution and the Fourteenth Amendment to the U.S. Constitution in that:

> i.) There is no rational relationship between (a) the policy of dividing attorneys who have passed the New Hampshire bar into those who took the bar examination prior to July 1973 and those who took it in July 1973 and thereafter; and (b) legitimate State objectives of ensuring a bar of competence and good moral character.
>
> The Court noted in the Policy that the examinations since July 1973 (hereinafter the "Multistate Exam") are comparable to the current examination. By implication the examinations prior to July 1973 (hereinafter the "New Hampshire Exam") are not.
>
> Petitioner asks what is the relevance of such a distinction? Applicants who took the exam in July 1973 (more than 12 years ago) are as unlikely as those who took the prior New Hampshire Exam to remember anything about the exam or their studies for it. Consequently, they are certainly no more qualified to practice in New Hampshire than attorneys in Mr. Drociak category who took the New Hampshire Exam. In fact, if one believes applicants can actually recall the legal knowledge they needed to pass either the New Hampshire or Multistate Exam which they took more than 12 years ago, much of it would certainly be out of date in today's practice. Further, the applicant who took the New Hampshire Exam would be more knowledgeable of New Hampshire law and practice than those who took the Multistate Exam which was more oriented to "black-letter", non-New Hampshire legal knowledge.

ii.) The Court has arbitrarily made an exception to the Two-Year Requirement so as to benefit attorneys similarly situated to the Petitioner, but not the Petitioner. The rationale of the Two-Year Requirement appears to have been to ensure that only attorneys with recent knowledge of New Hampshire law be admitted. Under the Policy the Court arbitrarily ignored the Two-Year Requirement rationale to Petitioner's detriment in allowing attorneys who took the bar examination *twelve years* earlier to be admitted without retaking the examination.

iii.) Under the Policy the Court has treated non-resident attorneys who took and passed the New Hampshire Exam differently from similarly situated resident attorneys. The Policy requires that out-of-state attorneys who passed the New Hampshire Exam take a new examination. Resident attorneys who passed the New Hampshire Exam are under no such requirement.

If the State's objective is to protect the public from the rusty memories of those attorneys who passed the New Hampshire Exam prior to July 1973, would it not make more sense to require that all attorneys who took the New Hampshire Exam (both residents and non-residents) take continuing legal education courses in prescribed areas?

iv.) Neither the Petitioner nor to his knowledge other attorneys were given an opportunity to learn of or comment on the Policy prior to its issuance, despite the fact that it materially and adversely affected his fundamental right to practice law in New Hampshire.

18. The Petitioner is at a loss in understanding the Court's treatment of his numerous requests for admission. Until issuance of the Policy the Court had turned down his admission requests because: (a) he was not a New Hampshire resident; and (b) several (now defined

as more than two) years had elapsed between passing the bar examination and requesting to take the oath of office. *Piper* struck down the non-residency ground. And in admitting without reexamination attorneys who had taken the bar examination up to twelve years before, this Court has emasculated the rationale of the Two-Year Requirement. Now the Court has set forth another ground which excludes Mr. Drociak from the New Hampshire bar—that he took and passed the bar examination prior to July 1973. The relevance of this fact is not apparent. No rational connection seems to exist between the Policy and the State's objectives of ensuring that its bar is morally fit and competent to practice law.

WHEREFORE, Mr. Drociak prays that:

A. The Court make an exception to the Policy and allow Mr. Drociak to be admitted to the New Hampshire bar;

B. If it is unable to make an exception to the Policy, the Court reconsider the constitutionality of the Policy, both on its face and as applied to Mr. Drociak, and amend it so as to allow Mr. Drociak to be admitted to the New Hampshire bar;

C. The Court hold a hearing on this Motion or otherwise explain the rational relationship between the Policy and State objectives; and

D. The Court grant such further relief as may be just.

Respectfully submitted,

JOSEPH L. DROCIAK
By his attorney,

/s/ Jon Groetzinger, Jr.
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Dated: 11 December 1985

EXHIBIT 1

(213) 971-3981

Law Offices of
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7627 So. Western Ave.
Los Angeles, Calif. 90047

March 14, 1985

Ralph H. Wood, Clerk of Court
New Hampshire Supreme Court
Supreme Court Building
Concord, New Hampshire 03301

Dear Mr. Wood:

I would like to request the opportunity to take the oath to be admitted as a member of the New Hampshire Bar.

As you may recall, I have previously made such a request on several occasions, having passed the Bar exam and having met the other admission requirements. I was told initially in 1961 and then several times thereafter that I had to be a New Hampshire resident in order to take the oath of admission.

In light of the March 4, 1985 decision of the United States Supreme Court in Piper vs. State of New Hampshire, it appears that the New Hampshire Supreme Court's initial and subsequent denials of my request based on a lack of New Hampshire residency were unconstitutional.

I respectfully request the opportunity to exercise now the right to take the oath which I had in 1961, but was prevented from exercising.

Thank you for examining this matter, I look forward to hearing from you.

Respectfully Submitted,

/s/ JOSEPH L. DROCIAK

JLD/at

EXHIBIT 2

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Ralph H. Wood
Clerk Of Court And
Reporter Of Decisions
Carol A. Belmain
Deputy Clerk

Frank Rowe Kenison
Supreme Court Building
CONCORD, N.H. 03301
(603) 271-2646

March 22, 1985

Joseph L. Drociak, Esq.
7627 South Western Avenue
Los Angeles California 90047

Dear Mr. Drociak

I have received your letter of March 14, 1985 requesting to be admitted to the New Hampshire Bar. The Supreme Court has until March 29, 1985 to file a Petition for Rehearing and when I know the final outcome, I will let you know. Since it has been twenty four years since you have taken and passed the bar exam, I do not yet know whether you will be eligible to be admitted without taking the exam again. According to Rule 42(8), the oath of admission must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed. I will be getting back to you as soon as the court has made its final decisions. If you have any questions, please don't hesitate to call.

Very truly yours,

/s/ Deborah A. Bills
Office of the Clerk

EXHIBIT 3

Law Offices of
JOSEPH L. DROCIAK
7627 So. Western Ave.
Los Angeles, Calif. 90047

April 24, 1985

Ralph H. Wood, Clerk of Court
New Hampshire Supreme Court
Supreme Court Building
Concord, New Hampshire 03301

Dear Miss Bills:

Thank you for yours of March 22, 1985.

You indicated that under rule 42(8) the oath of admission must be administered within 2 years after the date an applicant passes the bar examination.

Your statement is currently correct, however, I respectfully request that the Court take notice of the following facts, namely that the prior court clerk, George Shovan, stated to me that there was no time limit within which to take the oath of admission (see my prior pleadings), further that all of my requests to take the oath of admission in 1962, 1977 and again in 1979 pre-dated the 1980 two year oath requirement under rule 42(8).

Consequently I feel it would be unjust to apply the 2 year rule at this time to preclude my taking the oath of admission.

Thank you for your consideration of this matter.

Respectfully submitted,
JOSEPH L. DROCIAK

JLD/at

EXHIBIT 4

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Ralph H. Wood
Clerk of Court and
Reporter of Decisions
Carol A. Belmain
Deputy Clerk

Frank Rowe Kenison
Supreme Court Building
Concord, N.H. 03301
(603) 271-2646

May 27, 1985

Joseph L. Drociak, Esquire
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

I would like to respond to your letters of March 14, 1985 and April 24, 1985.

In light of the *Piper* decision, the Court has just adopted a special policy which relates to the admission of certain persons previously denied admission because of non-residency. A copy of the Statement of Policy is enclosed.

As you will see, the policy applies only to persons who have passed the bar examinations given in July, 1973, or thereafter (the examinations previous to that not having been comparable in form or content to the present examination). Those persons will not be required to retake the bar examination, but they must reapply and otherwise generally meet current requirements for admission.

Very truly yours,

/s/ Ralph H. Wood

RHW:dab
Enclosure

SUPREME COURT NOTICE

The Supreme Court has adopted the following policy regarding admission of bar applicants previously denied admission to the New Hampshire Bar solely because of the residency requirement:

Statement of Policy

During the period of two years from the date hereof, the Supreme Court will grant applications for admission to the Bar filed by those previously denied admission solely because they failed to fulfill the residency requirement of prior Rule 42, if

a. The applicant received a passing score on a New Hampshire bar examination (including the essay and multistate portions) comparable in form and content to the present examinations, i.e., bar examinations given on July 25 and 26, 1973, or thereafter;

b. The applicant has passed the Multistate Professional Responsibility Examination, provided that an applicant who satisfied condition (a) prior to January 1, 1981, shall not be required to satisfy this condition; and

c. The Committee on Character and Fitness reports favorably on the applicant.

May 13, 1985

EXHIBIT 5

June 20, 1985

Ralph H. Wood, Clerk
New Hampshire Supreme Court
Frank Rowe Kenison Supreme Court Building
Concord. N.H. 03301

RE: Joseph L. Drociak Admission to N.H. Bar

Dear Mr. Wood:

Thank you for your letter of May 27, 1985 regarding the Court's Notice of the Statement of Policy on admission of bar applicants who were previously denied admission.

As you are aware, I was denied admission to the New Hampshire bar solely because I failed to fulfill the residency requirement of prior Rule 42.

I would appreciate the Court's clarification as to how the new policy applies to me; specifically:

1. Does the policy allow for my admission to the bar without the necessity of having to take a bar examination again?

2. If not, on what basis has the Court determined that those applicants who successfully took the bar examination prior to July 1973 should not be eligible for admission without retaking the examination?

3. Would the Court consider an exception to the policy in my case, based upon Mr. Shovan's assurance in 1961 that I could be admitted at any time if I established New Hampshire residency?

Thank you for your help in this matter.

Very truly yours,

JOSEPH L. DROCIEK, ESQ.

JLD/at

EXHIBIT 6

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

RALPH H. WOOD
Clerk of Court and
Reporter of Decisions
CAROL A. BELMAIN
Deputy Clerk

FRANK ROWE KENISON
Supreme Court Building
CONCORD, N. H. 03301
(603) 271-2646

August 1, 1985

Joseph Drociak, Esquire
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

I have your letter of June 20, 1985. In reviewing the contents of my letter to you dated May 27, 1985, I conclude that your first two questions were answered as completely as they can be. As to your third question, I can only respond that a formal pleading would be necessary to bring the matter to the Court's attention.

Very truly yours

/s/ Ralph H. Wood

RHW:dab

IN THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

In Re Joseph L. Drociak No. 85-.....

MEMORANDUM SUPPORTING MOTION TO BE ADMITTED TO THE NEW HAMPSHIRE BAR

This Memorandum is in support of Petitioner's Motion To Be Admitted to the New Hampshire bar, filed the same date as this Memorandum.

Mr. Drociak believes that he has not been treated fairly in his quest to be admitted to the New Hampshire bar. He feels ackward indeed coming again before this Court asking the same question: Why can I not be admitted? However, the answer keeps changing. With each new answer, the greater grows Petitioner's confusion as to the underlying rationale of the Court in precluding his admission. Petitioner therefore pleads that the Court give a thoughtful reconsideration of this matter.

After passing the bar exam in 1961, Petitioner initially requested in 1962 to take the oath. He was turned away because he was not then a New Hampshire resident, but was assured he could take the oath any time he established residency.

When he again applied in 1977, he was again denied admission not only because he was a nonresident, but because contrary to the prior assurance, he had waited too long (later defined as more than two years) between his passing the bar exam and his request to take the oath.

While he believed that the Two Year Requirement had been improperly applied against him without notice, he at least appreciated the apparent rationale of the Court: To

ensure that only those attorneys with reasonably fresh legal knowledge be admitted.

Then came the *Piper* decision, holding the New Hampshire recidency requirement unconstitutional. *Piper* therefore left only the Two Year Requirement standing between Mr. Drociak and admission to the bar. Had the Court not issued its new 13 May 1985 policy ("Policy"), allowing the admission of attorneys who had passed the bar exam up to twelve years earlier, there was still some rational basis on which to deny Mr. Drociak's admission request earlier this year. There was still an apparent connection between the Two Year Requirement and the State's interest in admitting only competent attorneys to the New Hampshire bar.

However, in issuing the Policy, the Court ignored the rationale of the Two Year Requirement, allowing the admission of attorneys with up to twelve years experience, but who were not "fresh" from the bar exam.

Admitting attorneys with experience such as these in lieu of recently passing a bar exam would, of course, have been a reasonable course of action and in conformity with the State's interest in a competent bar.

What was not reasonable was establishing an arbitrary cut-off point between those who passed the July 1973 exam which included the multistate portion ("Multistate Exam") and those who passed the prior New Hampshire oriented exam ("New Hampshire Exam"). The Court alludes in the Policy to the different character of the Multistate Exam from the New Hampshire Exam. But what is the point here? What is the rational connection in discriminating against the New Hampshire Exam applicants and the State's interest in a competent bar?

It strains reason to argue that an attorney who passed the Multistate Exam twelve years ago is any more qualified to practice than an attorney who passed the prior New Hampshire Exam. If a poll were taken of those who took the July 1973 Multistate Exam and those who took the preceding New Hampshire Exam, doubtless very few applicants, if any, in either category would have even the vaguest recollection of the exams, other than remembering the horror of the experience. They would most likely not remember the questions, their answers, or the detailed knowledge they carried with them into the exams.

Even if a few did remember bits and pieces of legal knowledge acquired during their studies for the exam, much of the knowledge would now be outdated and inapplicable to today's New Hampshire practice. Moreover, of the knowledge that was still applicable today, those who took the pre-July 1973 New Hampshire Exam would be more familiar with New Hampshire law and practice since it was a more state-oriented exam than the exams given in July 1973 and thereafter. It would therefore be the attorneys in Mr. Drociak's category who would be the more competent to practice in New Hampshire.

In short, there is nothing that necessarily makes the applicants who took the Multistate Exam any more qualified than those who took the pre-July 1973 exam. Petitioner believes the type of exam applicants took more than a decade ago is irrelevent to their competency to practice in New Hampshire today. Even if one believes the type of exam is relevant, it could be argued that those who took the exam in July 1973 and thereafter are less qualified since they were not as stringently tested in New Hampshire law and practice.

What the Policy really represents is a convenient, clearly defined, but arbitrary distinction between two categories of attorneys. It discriminates against the pre-July 1973 category of which Mr. Drociak is a part, unconstitutionally depriving him of his right to practice law. He meets all other requirements for admission but for his incusion in this category.

Such distinction vioates the United States and New Hampshire Constitution's prohibition on State deprivation of life, liberty or property without equal protection and due process of law.

The right of an attorney to practice his profession has been recognized as a fundamental right, not simply a matter of grace. *Baird v. St. Bar of Arizona,* 401 U.S. 1, at 8, 27 L. ed. 2d 639, at 648, 91 S.Ct. 702, at 707 (1971).

While a State can clearly require high standards of qualification, such as good moral character or proficiency in its laws before it admits an applicant:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment . . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *Schware v. Board of Bar Exam. of State of N.M.,* 353 U.S. 232, at 238-239, 77 S.Ct. 752, at 756 (1957).

The "rational connection" test has until recently been a relatively easy test for a State to meet, compared to its

burden in justifying distinctions based on suspect categories such as race and sex. However, three recent U.S. Supreme Court decisions demonstrate that a State can no longer meet the test as easily. The following cases each applied the "rational connection" test and found the government's actions unconstitutional; *City of Cleburne v. Cleburne Living Center,* 473 U.S. —, 87 L. ed. 2d 313, 105 S.Ct. — (1985), *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. —, 84 L. ed. 2d 751, 106 S.Ct. — (1985), and *Williams v. Vermont,* 472 U.S. —, 86 L. ed. 2d 11, 105 S.Ct. — (1985).

In *Cleburne,* for example, the Cleburne City Council denied an application for a special use permit for a proposed group home for the mentally retarded. In applying the "rational connection" test, the Court reviewed each of the City's proffered justifications for the denial of the permit and concluded the denial was really based on "irrational prejudice."

The important lesson of these cases is that the "rational connection" test has acquired some teeth. As one commentator noted:

> "We've gotten used to the idea that if the test is rational basis, the legislation gets an automatic pass . . . Now rational basis is beginning to mean something." *ABA Journal, October,* 1985, p. 112.

The Court's Policy lacks any rational connection to the State's interest in a competent bar and therefore violates the Petitioner's right to equal protection by arbitrarily discriminating against him.

In addition, the Policy deprives him of his right to due process of law. The issuance of the Policy occurred without notice and without an opportunity to be heard. There

was not even an opportunity given to the members of the bar to comment on the Policy.

This procedure was most peculiar and foreign to the manner in which this Court normally conducts rule and policy changes. Normally the Court affords an opportunity for a hearing, such as the one on 10 December 1985 relating to the proposed changes in the Rules of Professional Conduct (see 12 NHLW 303, November 27, 1985), or at least a chance to submit written comments. The recent formation of the New Hampshire Supreme Court Advisory Committee on Rules indicates the Court's concern with giving notice and an opportunity to be heard on rule changes.

The above rule change hearings and opportunities for comment generally relate to rules that affect existing New Hampshire bar members. Should the procedure, however, be any different for policy changes that substantially affect Petitioner's right to be admitted to the bar? We think not. The Court's Policy impacted the Petitioner's rights much more substantially than other rule changes on which the Court has allowed comment and/or a hearing. In addition, Mr. Drociak has never been given any reasons why his inclusion in the category of those who took the bar exam before July 1973 should preclude his admission.

In applying the two-part analysis of *Appeal of Henry A. Plantier, M.D.*, 12 NHLW 157 (5/23/85), in determining whether the challenged procedures satisfy the due process requirement of the State (and in this case the Federal) Constitution, first there is no doubt that the right to practice law is a legally protected property right. See *Baird* citation above.

Second, the challenged procedures did not offer Mr. Drociak the appropriate legal safeguards: He should have

been entitled to prior notice of the Policy, a full hearing, and the right to be given rational reasons why passing the pre-July 1973 exam should make him incompetent to practice law in New Hampshire. As the U.S. Supreme Court stated in *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. ed. 2d 224, 83 S.Ct. 1175 (1963) involving the right of an attorney applicant to a hearing after passing the bar exam. but being denied admission:

> "There seems no question but that petitioner was appraised of the matters the Committee was considering.
>
> " 'But a "full hearing"—a fair and open hearing —requires more than that .... Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' " at 373 U.S. 105, 10 L. ed. 2d 230, 83 S.Ct. 1181.

In conclusion, Petitioner's rights to both equal protection and due process of law have been violated by the Court's Policy of 13 May 1985, and Petitioner respectfully requests that the Court grant the relief prayed for in the attached Motion.

Respectfuly submitted,

JOSEPH L. DROCIAK
By his attorney,

/s/ Jon Groetzinger, Jr.
7302 Pomander Lane
Chevy Chase, MD 20815
(301) 897-6734 or
(301) 986-1675

Dated: 11 December 1985